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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

IN RE U.S., a Person Coming Under the Juvenile Court Law.	H041822 (Monterey County Super. Ct. No. J48088)
THE PEOPLE, Plaintiff and Respondent, v. U.S., Defendant and Appellant.	

I. INTRODUCTION

The minor, U.S., appeals from a dispositional order placing him on probation following findings by the juvenile court that he resisted, delayed, or obstructed a peace officer (Pen. Code, § 148, subd. (a)(1); a misdemeanor),[1] and committed an assault on a peace officer (§ 241, subd. (c); a misdemeanor). The minor also admitted that he possessed marijuana on school grounds (Health & Saf. Code, § 11357, subd. (e); a misdemeanor).

[1] All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, the minor contends: (1) there is insufficient evidence to sustain the juvenile court's finding that he resisted, delayed, or obstructed a peace officer (§ 148, subd. (a)(1)); (2) the court failed to expressly find and there is insufficient evidence to sustain a finding that he had the capacity to commit the offense (§ 26, subd. One); and (3) the court abused its discretion in allowing the prosecution to add a count for assault on a peace officer (§ 241, subd. (c)) after the parties had rested at the jurisdictional hearing.

For reasons that we will explain, we will remand the matter for the juvenile court to strike the true finding on the count for assault on a peace officer (§ 241, subd. (c)) and to hold a new dispositional hearing.

II. BACKGROUND

A. *The First Petition*

In September 2014, a petition was filed under Welfare and Institutions Code section 602 alleging that on or about September 25, 2014, the minor, then age 13, willfully and unlawfully resisted, delayed, or obstructed a peace officer (§ 148, subd. (a)(1); a misdemeanor). The minor was initially detained but later released on home supervision.

B. *The Second Petition*

In October 2014, according to a home supervision incident report, the minor was suspended from school for having a controlled substance on campus. A petition was subsequently filed under Welfare and Institutions Code section 602 alleging that on or about October 21, 2014, the minor possessed marijuana on school grounds (Health & Saf. Code, § 11357, subd. (e); a misdemeanor).

C. *The Jurisdictional Hearing Regarding the First Petition*

1. The evidence

A contested jurisdictional hearing was held regarding the first petition for resisting a peace officer. The evidence presented at the hearing included the following.

On September 25, 2014, at 1:51 p.m., the minor's mother contacted King City Police Officer Ricardo Robles and requested assistance in looking for the minor. The officer responded to the residence where the mother reported that the minor had gotten expelled from school and he smelled like marijuana. The mother had started yelling at the minor. The minor became angry and tried to hit his mother in the face but missed. He "took off running" and the mother was worried about him. The mother reported to the officer that she was going to look for the minor and asked the officer to contact her if the officer found the minor.

The minor's mother contacted Officer Robles again at 4:30 p.m., and the officer filled out a missing persons report. When a person is reported missing, other agencies are told to be on the lookout for the person. If the person is found, a welfare check is conducted to make sure the person is alright and the person is returned to the parents.

The minor's mother contacted Officer Robles again at 5:17 p.m. outside the police station and reported that her husband had located the minor walking down a street. Officer Robles testified that the mother also asked him to "go and talk to [the minor] to see if he was under the influence of marijuana." She wanted the officer to "check [the minor] for marijuana."

Officer Robles had been a police officer for more than 15 years and had received several certifications, including a school resources officer certificate. The officer had also received training on how to determine if someone is under the influence of marijuana, and he had observed symptoms in people who were under the influence of marijuana.

The officer told the mother that he would "check" the minor. The officer believed it was illegal to be under the influence of marijuana only if the person is acting intoxicated, meaning the person cannot take care of himself or others, referring to section 647, subdivision (f).

Officer Robles testified that he contacted the minor outside the minor's residence. The minor's parents and two female friends, I.R. and J.B., were also present. The minor was calm. He reported that he had gotten expelled from school, that his mom had yelled at him when he got home, that he got upset, and that he took off running to a friend's house. The minor denied hitting or punching his mother.

Officer Robles testified that the minor did not exhibit any objective symptoms of being under the influence. The minor was able to stand on his own, he could communicate effectively, and it appeared he was able to care for himself. However, the officer wanted "[t]o make sure [the minor] wasn't under the influence at the request of the mom." The officer testified that the mother "requested" that the officer "check [the minor] for narcotics to make sure he was okay, and plus, [the minor had] tried to hit her."

Before he touched the minor, the officer advised the minor that he was going to check the minor's pulse to make sure he was not under the influence. The minor did not say anything in response but "put his arm out."

The officer testified that "at the request of [the] mother, [he] physically touched [the minor] and attempted to take his pulse." The officer "grabbed" the minor's wrist with three fingers to check his pulse. He subsequently explained that "[i]t was a mere touch" and that it did not involve "physical pulling or anything like that."

When the officer touched the minor's wrist, the minor pulled his arms back and put "his arms at 90 degree angles with fists clenched facing outward from the mid torso to the officer's body." The officer told the minor to "relax."

The officer testified that the minor tried to punch him in the nose. The officer pulled back to avoid being punched while still holding the minor's wrist. The officer believed that if he had been struck, his nose could have been "busted" or started bleeding.

The officer testified that he pushed the minor backward into a vehicle and told him to stop resisting. The minor was tense and tried to punch the officer again while the officer continued holding his wrist. The officer did a "front leg sweep," which caused the

minor to fall and scrape the side of his face on a wooden fence. The officer eventually handcuffed the minor, patted him for weapons, and called dispatch for assistance. The minor was calm and in tears by this point. The minor's father stated, "That is what you get for trying to hit a police officer."

At some point during the incident, the minor told the officer that he had tried to punch the officer because he was upset that his mother had called the police. Two additional officers arrived and interviewed the parents and the two girls, I.R. and J.B., who were present at the scene.

I.R., who knew the minor from school, testified on the minor's behalf. According to I.R., the minor's mother had come to her house crying and stating that the minor had left. At the suggestion of I.R.'s mother, I.R. and J.B. helped the minor's mother look for the minor.

After the minor was located, I.R. and J.B. talked to the minor outside his house with his parents. The girls were mad at the minor for running away. Eventually Officer Robles, who was wearing a uniform, arrived in a police car. The officer approached the minor in a calm, friendly manner, stating, "What's up dude," or "What's up man?" I.R. did not think the officer was using the "correct tone of voice" with the minor because she and J.B. "were trying to teach [the minor] a lesson" that "it wasn't right to leave." The officer told the girls to "step away," and the girls moved a few feet away.

I.R. testified that the minor and the officer were talking and that eventually the two became angry. The minor had his arms crossed with his hands under his forearms as the officer went to check the minor's pulse. When asked at the jurisdictional hearing whether she saw the minor "hold out his arm" for the officer, I.R. testified: "He just went like that because he is, like, What are you doing? He is asking him what, like -- because I think he didn't understand what he meant when he said check his pulse." When the officer reached toward the minor, the minor "put his arms back." I.R. did not see the

minor "take a swing" at the officer. According to I.R., when the minor threw his arms back, the officer grabbed the minor by the arm, threw him to the ground, and arrested him.

J.B., who had known the minor for a few months, testified on the minor's behalf. J.B. heard the officer tell the minor that the officer was going to check the minor's pulse. J.B. saw the officer reach for the minor's wrist. J.B. looked at her phone because she was going to record the incident. J.B. ultimately saw the minor on the ground. She did not see the minor "try to swing" at the officer.

Tyler Beal, an investigator with the public defender's office, testified on the minor's behalf. Beal had interviewed J.B. and I.R., both of whom were 13 years old. J.B.'s interview took place nearly a month after the incident. J.B. told the investigator that Officer Robles had reached for the minor's neck to check his pulse. The minor uncrossed his arms, and the officer grabbed the minor and threw him to the ground.

The minor testified in his own behalf that, on the day of the incident, his mother had been yelling at him. He denied hitting her. The minor testified that he was mad about being expelled from school so he ran away to his friend's house for about an hour. As he was returning home, his father found him and took him home.

According to the minor, his arms were crossed and his hands were underneath his arms when the officer stated that he was going to check the minor's pulse. The minor testified that he did not "offer" his hands to the officer, and that the officer "just leaned for it." The officer was not able to make contact with the minor's arm because the minor "separated" his arms by unfolding them and pulling them back, with his elbows facing the ground and his fists pointed upward. According to the minor, the officer "mistook" the minor pulling his arms back for "taking a swing," and consequently the officer "grabbed" the minor's hand or wrist area and "threw" the minor to the ground. The minor denied attempting to "swing" at the officer at any time.

2. The motion to amend the first petition and the court's findings

After the parties rested, the prosecutor moved to add count 2, a violation of section 241, subdivision (c) (misdemeanor assault on a peace officer), to conform to proof at the hearing. The minor objected based on lack of notice. The juvenile court granted the motion.

During argument, the prosecutor contended that the minor acted aggressively toward Officer Robles and resisted and delayed the officer in the course of the officer's lawful duties. In particular, the officer responded to the scene at the request of the minor's mother. The officer was investigating whether the minor had assaulted his mother, whether the minor was under the influence of a controlled substance, and whether the minor was able to care for his own safety, "or whether he was unable to care for himself since he was running away and striking at the people who love him." As part of this investigation, the officer interviewed the minor about the assault on his mother, and the officer went to check the minor's pulse to determine whether he was under the influence. The minor "put his hand out, and the officer grabbed it." The minor behaved aggressively thereafter, including by attempting to punch the officer.

The minor argued that any resistance on his part occurred after Officer Robles made physical contact with his wrist to attempt to check his pulse, and that the prosecution failed to prove that the officer was lawfully performing his duties at that point. According to the minor, "[t]he only situation where criminal conduct could be occurring" would be under section 647, subdivision (f) (disorderly conduct), but the officer did not observe any symptoms that would make the officer suspect the minor was under the influence or unable to care for himself. The minor further argued that, "even at the behest of a concerned and worried mother, Officer Robles went beyond his lawful performance of duties when he attempted to take [the minor's] pulse." The minor contended that a detention or a battery occurred, and that he did not consent.

The juvenile court questioned whether the officer's investigation ended prior to the checking of the minor's pulse, when the officer failed to see any objective symptom of the minor being under the influence. The minor responded that the investigation into him being under the influence ended before the officer touched him because there was no reasonable suspicion of criminal activity at that time.

The juvenile court analogized to a DUI investigation where an officer will "go through a series of events," such as asking questions and possibly conducting a field sobriety test, before coming to a conclusion. The minor contended that, "at some point in time it becomes an unlawful detention when you are talking about a physical contact." The minor argued that the officer did not have "any grounds to continue . . . to put his hands" on the minor. The minor further argued that it is not illegal to be under the influence of marijuana.

The juvenile court ultimately determined that the officer was in the performance of his duties. The minor's parents had told the officer that they thought the minor was potentially under the influence of marijuana. Although the officer did not observe symptoms in the minor, the officer continued to check the minor's pulse "because that is part of the thing that he would want to know." The court believed that if the officer "stopped too soon, he would be in dereliction of his duties and subject to civil suits, internal investigation, all kinds of things." The juvenile court also found the prosecution's witnesses credible. The court concluded that the prosecution had proven beyond a reasonable doubt that the minor committed the violations described in count 1, misdemeanor resisting or delaying a peace officer, and count 2, misdemeanor assault on a peace officer.

D. ***The Minor's Admission Regarding the Second Petition and the Dispositional Hearing Regarding Both Petitions***

On January 6, 2015, the juvenile court was informed that the parties had reached a potential resolution of the second petition regarding the minor's possession of marijuana

on school grounds. Prior to the minor admitting the allegation, the court asked the minor whether he knew the difference between right and wrong. The minor responded affirmatively. The minor indicated that when he fails to do jobs or chores at home, he gets in trouble and his phone is taken away. The minor also indicated that he knew it was against the law for him to have marijuana at the time he took it to school, that he knew he was not supposed to have marijuana at school, and that he knew he could get punished if someone caught him. The court asked the parties whether they had "[a]ny further inquiries on the issue of whether or not [the minor] knew the difference at the time between right and wrong or whether . . . he knew it was inappropriate and that he could be punished for it." Neither party had any further questions. The minor ultimately admitted the allegation that he had possessed marijuana on school grounds (Health & Saf. Code, § 11357, subd. (e), a misdemeanor).

The juvenile court proceeded to disposition on both petitions that same day, January 6, 2015. The juvenile court declared the minor a ward of the court and placed him on probation for two years with various terms and conditions. The court indicated that probation could be terminated after one year depending on how the minor did on probation.

III. DISCUSSION

A. *Sufficiency of the Evidence*

Regarding the count for resisting an officer (§ 148, subd. (a)(1)) in the first petition, the minor contends that the prosecution failed to prove Officer Robles was acting lawfully at the time he "grabbed and held [the minor's] wrist in an attempt to check his pulse against his will." The minor contends that the officer assumed the minor was consenting to having his pulse checked when the minor initially held out his arm, but that the minor "effectively withdrew any consent when he pulled his arm away before Officer Robles could check his pulse." The minor argues that the officer should have released him instead of continuing to hold onto his wrist and telling him to relax. The

minor contends that the officer conducted an unreasonable search and seizure in violation of the Fourth Amendment.

The Attorney General argues that the officer had "two valid reasons for contacting [the minor] to investigate his reported marijuana intoxication that day." First, the mother stated in her initial report to the officer that the minor had tried to hit her in the face before he fled from home. Second, the mother reported that the minor smelled of marijuana before he fled. According to the Attorney General, this "flight following his apparently irrational conduct of attempting to hit his mother in the face indicated that he could be under the influence of marijuana and thus could be a danger to himself or others." After the minor was located, the mother requested that the minor be checked for marijuana intoxication. The Attorney General contends that "there was reasonable suspicion for [the officer's] initial contact with [the minor], followed by the brief touching to take [the minor's] pulse, to ascertain whether he was intoxicated so as to be a danger to himself or his mother."

" 'The standard of proof in juvenile proceedings involving criminal acts is the same as the standard in adult criminal trials.' [Citation.]" (*In re Cesar V.* (2011) 192 Cal.App.4th 989, 994 (*Cesar V.*).) " ' "This court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact." ' " (*Id.* at p. 995.)

Section 148, subdivision (a)(1) makes it a crime to resist an officer "in the discharge or attempt to discharge any duty of his or her office or employment." To be convicted of a violation of this statute, " 'there must be proof beyond a reasonable doubt that the officer was acting lawfully at the time the offense against him was committed.'

[Citation.] ‘ “The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in ‘duties,’ for purposes of an offense defined in such terms, if the officer’s conduct is unlawful . . . .” ’ [Citations.]” (*Garcia v. Superior Court* (2009) 177 Cal.App.4th 803, 819 (*Garcia*).) An officer is not lawfully performing his or her duties when the officer detains an individual without reasonable suspicion. (*Ibid.*)

“A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.” (*People v. Souza* (1994) 9 Cal.4th 224, 231; see *People v. Turner* (2013) 219 Cal.App.4th 151, 160 (*Turner*) [the “ ‘circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that . . . some activity relating to crime has taken place or is occurring or about to occur’ ”].) “The officer’s subjective suspicion must be objectively reasonable, and ‘an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith. [Citation.]’ [Citation.] But where a reasonable suspicion of criminal activity exists, ‘the public rightfully expects a police officer to inquire into such circumstances “in the proper exercise of the officer’s duties.” [Citation.]’ [Citation.]” (*People v. Wells* (2006) 38 Cal.4th 1078, 1083.) “In determining the lawfulness of a temporary detention, courts look at the ‘ “totality of the circumstances” of each case to see whether the detaining officer has a “particularized and objective basis” for suspecting legal wrongdoing.’ [Citations.]” (*Turner*, *supra*, 219 Cal.App.4th at p. 160.)

In this case, at the time Officer Robles attempted to take the minor’s pulse, the officer had reasonable cause for suspecting that the minor may be under the influence of marijuana and unable to exercise care for his own safety or the safety of others. (§ 647, subd. (f).) The minor’s mother had reported earlier that afternoon that the minor smelled

of marijuana, that he had tried to hit her in the face, and that he had fled the residence. The mother requested assistance in looking for the minor. When the minor was located less than three and a half hours later, the mother contacted the officer again and requested that the officer "check" the minor for marijuana and "see if he was under the influence of marijuana." The officer proceeded to talk to the minor because the mother had requested that the officer "check [the minor] for narcotics to make sure he was okay" and because the minor had reportedly tried to hit the mother. The officer subsequently attempted to take the minor's pulse to actually "make sure [the minor] wasn't under the influence." In view of the circumstances, including the smell of marijuana on the minor a short time earlier, the minor's attempted attack on his mother, the minor running away, and the mother's expressed concern about whether the minor was still under the influence after he was located, the officer had a reasonable basis for suspecting that the minor may be under the influence of marijuana and a danger to himself or others. (See *Turner*, *supra*, 219 Cal.App.4th at p. 160 [detaining officer must have a " ' "particularized and objective basis" for suspecting legal wrongdoing' "])

We are not persuaded by the minor's argument that, because he did not appear to be under the influence to the officer, the officer lacked reasonable suspicion of criminal activity. The officer's observations of the minor were only part of the circumstances leading up to the officer's attempt to check the minor's pulse. As we have explained, the minor's mother reported that the minor had smelled of marijuana and had attempted to strike her in the face a short time earlier. It may reasonably be inferred from the evidence that the mother believed the minor could still be under the influence after he was located, given her request that the officer return to check the minor, and her failure to object when the officer attempted to take the minor's pulse.

Moreover, the officer's inability to detect symptoms of being under the influence during his brief interaction with the minor did not necessarily establish that the minor was not under the influence. For example, there was no evidence at the hearing suggesting

that a person under the influence of marijuana will always exhibit physical symptoms that would have been ascertainable to the officer during his encounter with the minor. Instead, the evidence reflected that Officer Robles had been a police officer for more than 15 years, that he had had training in determining whether someone was under the influence of marijuana, and that he could not be sure that the minor was not under the influence. In particular, the officer indicated in his testimony that he wanted to check the minor's pulse "[t]o make sure [the minor] wasn't under the influence at the request of the mom."

In sum, viewing the evidence in the light most favorable to the prosecution, as we must (*Cesar V.*, *supra*, 192 Cal.App.4th at p. 995), we determine that there is substantial evidence to support the implied findings by the juvenile court that the officer had reasonable suspicion to detain the minor, and that the officer was therefore acting lawfully at the time the minor resisted or delayed the officer (*Garcia*, *supra*, 177 Cal.App.4th at p. 819).

B. *Knowledge of Wrongfulness*

The minor, who was 13 years old at the time of the incident involving Officer Robles, contends that the trial court failed to make an express finding that he (the minor) knew the wrongfulness of the charged act at the time it was committed, and there is not substantial evidence to support such a finding. The Attorney General responds that there is sufficient evidence to support an implied finding that the minor understood the wrongfulness of his acts.

Section 26 provides that "[a]ll persons are capable of committing crimes except those belonging to" specified classes, such as "[c]hildren under the age of 14, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness." (§ 26, subd. One.) As explained by the California Supreme Court, "section 26 articulates a presumption that a minor under the age of 14 is incapable of committing a crime. [Citation.] . . . This provision applies to proceedings under

Welfare and Institutions Code section 602. [Citation.] Only those minors over the age of 14, who may be presumed to understand the wrongfulness of their acts, and those under 14 who—as demonstrated by their age, experience, conduct, and knowledge—clearly appreciate the wrongfulness of their conduct rightly may be made wards of the court in our juvenile justice system. [Citation.]" (*In re Manuel L.* (1994) 7 Cal.4th 229, 231-232, fns. omitted (*Manuel L.*).)

To defeat the presumption that a minor under the age of 14 is incapable of committing a crime, "the People must show by 'clear proof' that at the time the minor committed the charged act, he or she knew of its wrongfulness." (*Manuel L.*, *supra*, 7 Cal.4th at pp. 231-232.) In other words, "for a section 602 petition to be sustained, the People must prove by clear and convincing evidence that the minor appreciated the wrongfulness of the charged conduct at the time it was committed." (*Id.* at p. 232.)

"Although a minor's knowledge of wrongfulness may not be inferred from the commission of the act itself, 'the attendant circumstances of the crime, such as its preparation, the particular method of its commission, and its concealment' may be considered. [Citation.] Moreover, a minor's 'age is a basic and important consideration [citation], and, as recognized by the common law, it is only reasonable to expect that generally the older a child gets and the closer [he] approaches the age of 14, the more likely it is that [he] appreciates the wrongfulness of [his] acts.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 378 (*Lewis*).)

On appeal, "we must affirm an implied finding that the juvenile understood the wrongfulness of his conduct if the implied finding is supported by substantial evidence. [Citations.]" (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 297-298, fn. omitted.)

In this case, the petition alleged that the minor resisted, delayed, or obstructed a peace officer (§ 148, subd. (a)(1)). The minor was 13 years two months old at the time of the incident. The evidence established that the minor engaged in a physical struggle with the officer and attempted to punch the officer. After the minor was located by his

parents, the minor's mother initiated contact with law enforcement to determine whether her son was under the influence. The minor's 13-year-old friends also sought to "teach him a lesson" that "it wasn't right" for him to run away. Immediately after the incident, the minor's father admonished the minor by stating, "That is what you get for trying to hit a police officer." Given these individuals in the minor's life, the evidence of their views about right and wrong, and their apparent efforts to keep the minor on the proper path in life, we find it difficult to believe that this 13-year-old would not have known prior to the incident that it is wrong to strike a police officer, or to otherwise resist, delay, or obstruct an officer. (See *Lewis*, *supra*, 26 Cal.4th at p. 379 ["we would find it difficult to conclude that a 13 year old would not know it is wrong to douse a man with gasoline and throw a lighted match"].) We determine that substantial evidence supports the trial court's implied finding that "at the time the minor committed the charged act, he . . . knew of its wrongfulness." (*Manuel L.*, *supra*, 7 Cal.4th at pp. 231-232; see § 26, subd. One.)

C. *Amendment of the First Petition*

The first petition filed against the minor in September 2014 alleged that the minor unlawfully resisted, delayed, or obstructed a peace officer in violation of section 148, subdivision (a)(1). After the parties rested at the contested jurisdictional hearing, the juvenile court granted the prosecution's motion, over the minor's objection, to add count 2, a violation of section 241, subdivision (c), misdemeanor assault on a peace officer.

On appeal, the minor contends that the juvenile court abused its discretion in granting the prosecution's motion to amend the petition. The minor argues that the prosecution did not give adequate notice, and that the newly alleged offense was not specifically alleged in the petition before the petition was amended and was not necessarily included within the offense already alleged in the petition.

The Attorney General concedes that the minor's claim "has merit." We find the concession appropriate.

" '[Due] process requires that a minor, like an adult, have adequate notice of the charge so that he may intelligently prepare his defense. [Citation.]' [Citation.]" (*In re Robert G.* (1982) 31 Cal.3d 437, 442 (*Robert G.*).) In view of this due process right, "any amendment of the charging allegations in a delinquency petition is strictly limited once a minor has entered a plea of not guilty. In particular, absent the minor's consent, amendment during a contested hearing is only appropriate if an offense is ' "necessarily included" ' in the offense actually charged or is ' "a lesser offense which, although not necessarily included in the statutory definition of the offense, is expressly pleaded in the charging allegations." ' [Citations.]" (*In re A.L.* (2015) 233 Cal.App.4th 496, 499-500, italics omitted (*A.L.*); accord, *Robert G., supra*, at pp. 442-443.)

In particular, " '[t]he elements test asks whether all the statutory elements of the lesser offense are included in the elements of the greater offense. [Citation.] "Stated differently, if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." [Citation.] Under the accusatory pleading test, a lesser offense is included within a greater " ' "if the charging allegations of the accusatory pleading include language describing the offense in such a way that if committed as specified the lesser offense is necessarily committed." [Citation.]' " [Citation.]' [Citations.]" (*A.L., supra,* 233 Cal.App.4th at pp. 502-503.) "We review the juvenile court's decision in this regard for abuse of discretion. [Citations.]" (*Id.* at p. 500.)

In this case, the petition alleged that the minor "did willfully and unlawfully resist, delay, or obstruct . . . a peace officer attempting to and discharging the duty of his office and employment" under section 148, subdivision (a)(1). Because the allegations of the petition "simply tracked section [148, subdivision (a)(1)]'s language without providing

additional factual allegations, we focus on the elements test." (*People v. Shockley* (2013) 58 Cal.4th 400, 404.)

The elements of a violation of section 148, subdivision (a)(1) are the following: " ' " '(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties.' " ' [Citation.]" (*Garcia*, *supra*, 177 Cal.App.4th at p. 818.) Regarding the offense of assault on a peace officer, section 241, subdivision (c) provides for punishment "[w]hen an assault is committed against the person of a peace officer . . . engaged in the performance of his or her duties, . . . and the person committing the offense knows or reasonably should know that the victim is a peace officer . . . engaged in the performance of his or her duties." An assault is defined as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.)

It is possible to violate section 148, subdivision (a)(1) without necessarily violating section 241, subdivision (c). For example, a person may be found to have resisted, delayed, or obstructed a peace officer under section 148, subdivision (a)(1), without having assaulted the officer in violation of section 241, subdivision (c). (See *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 518 [officer had reasonable cause to believe that a person willfully resisted, delayed, or obstructed the officer in violation of § 148, subd. (a)(1), when the person, "in response to [the officer's] request that he exit the car, moved into the driver's seat and drove off with the headlights unilluminated"].)

Because a violation of section 241, subdivision (c) (assault on a peace officer) is not necessarily included in the offense actually alleged (§ 148, subd. (a)(1); resisting a peace officer) under the elements test, nor is it a lesser offense that was expressly alleged in the petition under the accusatory pleading test, we determine that the juvenile court erred in granting the prosecution's motion to amend the September 2014 petition to add

the count for a violation of section 241, subdivision (c) (misdemeanor assault on a peace officer) over the minor's objection. (*A.L.*, *supra*, 233 Cal.App.4th at pp. 500, 502-503; *Robert G.*, *supra*, 31 Cal.3d at pp. 442-443.) We will order the true finding as to this count stricken.

The Attorney General contends, without any analysis or citation to authority, that the striking of count 2 has "no effect on the disposition because [the minor] was placed on probation, with the possibility of termination of probation after one year." The minor does not address this point in his reply brief. We will remand the matter to the juvenile court for a new dispositional hearing.

IV. DISPOSITION

The dispositional order of January 6, 2015, is reversed. The matter is remanded for the juvenile court to strike the true finding as to count 2, misdemeanor assault on a peace officer (Pen. Code, § 241, subd. (c)), in the September 2014 petition, and to hold a new dispositional hearing.

_____
BAMATTRE-MANOUKIAN, J.

WE CONCUR:

_____
ELIA, ACTING P.J.

_____
MIHARA, J.